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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

JOHN O. ZIPPERER, JR., an individual,

Petitioner,

vs.

THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependent Special District known as Colonial Road Extension Improvement Special District; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause of the Fourteenth Amendment requires a public body to give prior actual written notice to the owner of a prior-recorded first mortgage lien, whose address is easily ascertainable from the public records, of special assessment hearings which create enormous "super-priority" special assessment liens that immediately and drastically diminish the value of the prior-recorded first mortgage lien by subordinating the first mortgage lien to the super-priority special assessment liens?

2. Does the decision of the court of appeals below, which holds that an owner of a prior-recorded Florida first mortgage lien is not entitled to prior actual notice of the subordination of his first lien to millions of dollars of super-priority special assessment liens, conflict with this court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) which holds that a super-priority lien arising from a tax sale does immediately and drastically diminish the value of a prior-recorded mortgage lien?

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

JOHN O. ZIPPERER, JR.

Respondents:

The City of Fort Myers, a chartered municipality and political subdivision of the State of Florida; Fort Myers City Council, as Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Fort Myers City Council, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; Fort Myers City Council, as the Governing Authority of Improvement District No. 17; Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Improvement District No. 15, Omni Interstate Park; Improvement District No. 17; Lee County, a political subdivision of the State of Florida; Colonial Road Extension Improvement Special District Board, as the Governing Authority of the Defendant Special District known as Colonial Road Extension Improvement Special District; Colonial Road Extension Improvement Special District.[1]

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[1] Although not a named party, the State of Florida filed amicus curiae briefs in support of the Respondents' position in both the Court of Appeals and District Court below and has been served with this Petition.

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THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependent Special District known as Colonial Road Extension Improvement Special District; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, John O. Zipperer, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on January 3, 1995, rehearing denied February 10, 1995.

OPINIONS BELOW

The Judgment and opinion of the Court of Appeals for the Eleventh Circuit for which review is sought is reported as *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995) and is reprinted in the Appendix. (App. A). The Order and accompanying Memorandum of the United States District Court for the Middle District of Florida granting summary judgment is unreported and reprinted in the appendix. (App. B). Additionally, the unreported February 10, 1995 Order of the Eleventh Circuit Court of Appeals denying Mr. Zipperer's and the City of Fort Myers requests for rehearing is also reprinted in the appendix. (App. C).

STATEMENT OF JURISDICTION

Judgment was rendered by the Court of Appeals for the Eleventh Circuit on January 3, 1995 and rehearing was denied on February 10, 1995. On March 8, 1995, the Court of Appeals granted Petitioner's Motion for Stay of the Mandate until May 8, 1995.

This Court's jurisdiction to review a judgment and opinion of the United States Court of Appeals for the

Eleventh Circuit is invoked pursuant to 28 U.S.C. § 1254(1). This petition is filed within 90 days of the entry of the Eleventh Circuit's order denying petitioner's motion for rehearing in accordance with 28 U.S.C. § 2101(c) and U.S. Supreme Court Rule 13.4.

Federal Court Jurisdiction of Mr. Zipperer's cause of action is proper pursuant to 28 U.S.C. § 1331 as a federal question action which arises under the United States Constitution. The Tax Injunction Act (28 U.S.C. § 1341) does not bar federal court jurisdiction of this action because, for the reasons cited in the Eleventh Circuit's Opinion, the Petitioner has no "plain, speedy and efficient remedy" available in the Florida courts and because the petitioner does not seek to "enjoin, suspend or restrain" the collection of a tax.[2]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV, Section 1 of the United States Constitution provides in pertinent part:

> nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

Due to its length, *Florida Statutes*, Chapter 170 (1993) is reproduced in its entirety in the Appendix. (App. E). The

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[2] The City filed a Petition for Rehearing (App. D) arguing that the federal courts did *not* have jurisdiction of Mr. Zipperer's suit and citing for example, *Tramel v. Schrader*, 505 F.2d 1310 (5th Cir. 1975).

applicable portion of Chapter 170 dealing with the notice of special assessment hearings is *Florida Statutes* 170.07, which reads in pertinent part:

> Upon the completion of said preliminary assessment roll, the governing authority of the municipality shall by resolution fix a time and place at which the *owners of the property* to be assessed *or any other persons interested therein* may appear before said governing authority and be heard as to the propriety and advisability of making such improvements, as to the cost thereof, as to the manner of payment therefor, and as to the amount thereof to be assessed against each property so improved. *Ten days' notice in writing of such time and place shall be given to such property owners*. . . . Notice of the time and place of such hearing shall also be given by two publications a week apart . . . provided that the last publication shall be at least 1 week prior to the date of the hearing.

The applicable portion of Chapter 170 dealing with the imposition of super-priority special assessment liens is Florida Statutes 170.08, which reads in pertinent part:

> At the time and place named in the notice provided for in s. 170.07, *the governing authority of the municipality shall meet and hear testimony from affected property owners as to the propriety and advisability of making the improvements and funding them with special assessments on property.* Following the testimony, the governing authority of the municipality *shall make a final decision on whether to levy the special assessments.* Thereafter, the governing authority *shall meet as an equalizing board to hear and consider any and all*

> *complaints as to the special assessments and shall adjust and equalize the assessments on a basis of justice and right.* When so equalized and approved by resolution or ordinance of the governing authority, a final assessment roll shall be filed with the governing authority of the municipality, and *such assessments shall stand confirmed and remain legal, valid, and binding first liens* upon the property against which such assessments are made until paid. . . .

STATEMENT OF THE CASE

A. Factual Summary

On August 14, 1986, P. Gerald DeSimone, as trustee, executed and delivered a promissory note for $8,900,000.00 to Mr. John O. Zipperer, Jr. ("Mr. Zipperer"). To secure the promissory note, Mr. DeSimone delivered a first mortgage to Mr. Zipperer which was recorded that same day in Official Record Book 1862, pages 4282-4286 of the Public Records of Lee County, Florida. The Mortgage granted Mr. Zipperer a first mortgage lien on the real property described in the mortgage, prohibited impairment of the property by Mr. DeSimone and stated Mr. Zipperer's name and mailing address.

After the recording of the first mortgage lien, the City of Fort Myers and Lee County, Florida created special assessment districts which included the mortgaged property. These districts built unnecessary and ultimately worthless highways, sewers and water lines which would

never have been built through normal commercial institution lending. Then, between March 7, 1988 and October 24, 1990, the City of Fort Myers and Lee County held a series of special assessment hearings. They then passed resolutions at those hearings which purported to create huge super-priority special assessment liens on properties located within the special assessment districts. The resolutions passed by the City of Fort Myers created an estimated $13,000,000 of special assessment liens for water and sewer facilities in Improvement District 10, an estimated $10,900,000 in special assessment liens for water distribution, wastewater collection, roadway and paving improvements in Improvement District 15; and an estimated $6,017,000 in special assessment liens for roadway improvements in Improvement District 17. Collectively, the resolutions passed by the City of Fort Myers also provided that a total of $919,600 in special assessment funds were to be paid to the City for "administration" of these special assessments. The resolutions passed by Lee County also purported to create super-priority special assessment liens in the amount of $4,791,325 for roadway improvements in the Colonial Road Extension Special Improvement District. All the special assessment liens created at these hearings purported to take priority over and subordinate Mr. Zipperer's first mortgage lien.

Mr. DeSimone, the owner, was given prior written notice of each of these special assessment and lien creation hearings. Under Florida Statutes, Chapter 170 (App. E) written notice only went to the property owner (who already knew of the special assessments because he requested them) but not to owners of first mortgages which would be subordinated by the super-priority

assessment liens. Neither the City of Fort Myers nor Lee County gave Mr. Zipperer prior written notice of any of these special assessment hearings and Mr. Zipperer did not participate in those hearings. Instead of providing mortgagees, such as Mr. Zipperer, with prior written notice, the City of Fort Myers and Lee County merely published notices of the special assessment hearings in a local newspaper. The published notice did *not* disclose that the assessment liens would subordinate prior recorded mortgages.

On April 18, 1991, after the purported creation of these super-priority special assessment liens, Mr. Zipperer filed a foreclosure action on the mortgaged property in Florida's 20th Judicial Circuit in and for Lee County, Florida. On November 26, 1991, the court granted Mr. Zipperer a Judgment of Foreclosure and the mortgaged property was subsequently sold and a certificate of title issued to Mr. Zipperer on February 4, 1992. Mr. Zipperer then filed a motion for relief from foreclosure judgment to the extent made necessary by the claimed super-priority special assessment liens and simultaneously filed a lawsuit in the Federal District Court for the Middle District of Florida seeking to resolve the Federal Question raised by the City of Fort Myers and Lee County's alleged super-priority special assessment liens.

B. Procedural History

Mr. Zipperer filed his original complaint in this action on November 25, 1992, which was amended on October 27, 1993. This case presents a federal question

under 28 U.S.C. § 1331 because the amended complaint alleges both the City of Fort Myers and Lee County denied Mr. Zipperer procedural due process when they failed to provide Mr. Zipperer with prior written notice of special assessment hearings which materially and adversely affected Mr. Zipperer by imposing special assessment liens which purported to subordinate Mr. Zipperer's prior-recorded first mortgage. Mr. Zipperer's name and address were clearly stated in the prior-recorded mortgage. As a direct result of the City's and County's failure to provide Mr. Zipperer with notice, Mr. Zipperer lost a significant property interest when his first mortgage was subordinated to a junior lien without Mr. Zipperer's prior knowledge. Mr. Zipperer's request for relief asked that the court grant declaratory relief, a prioritization of the liens, foreclosure of the City of Fort Myers and Lee County's special assessment liens, compensatory damages and such other relief as would be just, necessary and proper.

After a hearing on the Defendants' motions to dismiss or in the alternative motions for summary judgment, the District Court granted summary judgment and dismissed the case. (App. B). The exact basis for the District Court's holding was unclear. On one hand, the District Court stated "the theory of the plaintiff now at bar" had been put to rest. (App. B, B3). On the other hand, the District Court held that "procedural due process requires an opportunity to be heard either pre- or *post*-action" and that "[i]n this type of case the State of Florida gives the plaintiff ample opportunity to litigate this question." (App. B, B3).

On January 3, 1995, the Eleventh Circuit Court of Appeals issued an opinion, affirming the District Court's Order granting summary judgment, which is reported as *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995) (App. A). After determining that the Federal Courts had jurisdiction of Mr. Zipperer's claims, the Eleventh Circuit denied Mr. Zipperer's procedural due process claim, though it noted that the United States Supreme Court had never directly addressed the issue presented.

Mr. Zipperer and the City of Fort Myers both filed timely motions for rehearing. The City of Fort Myers requested the court to reconsider its holding that the Tax Injunction Act did not bar Federal Jurisdiction of this case. (App. D). Both motions were denied by the Eleventh Circuit on February 10, 1995. (App. C).

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit Court of Appeals decided an important question of federal law in a manner that conflicts with the rationale of this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) and deprives Mr. Zipperer, a prior recorded first mortgage lienholder, of his constitutional right to actual prior written notice of special assessment liens which immediately and substantially diminish Mr. Zipperer's constitutionally protected property right in his first mortgage lien in violation of the Due Process Clause of the Fourteenth Amendment.

The fundamental issue in this case is whether a local government, without providing actual prior written

notice and an opportunity to be heard to a mortgagee, can subordinate a first mortgage to millions of dollars of special assessment liens for unnecessary and ultimately worthless improvements without violating the Due Process Clause of the Fourteenth Amendment. Mr. Zipperer's name and address were stated in the mortgage and recorded in the Lee County Public Records. The City and County, which received nearly a million dollars for "Administration" expenses, merely had to pay for a stamp and letter to Mr. Zipperer to inform him of the special assessment and lien imposition hearings. If the City and County undertook this minimal effort, then this petition would not be before this Court.

In its opinion below, the Eleventh Circuit noted that:

> Since the *Mennonite* decision, neither the Supreme Court nor this Circuit have addressed whether the imposition and prioritization of special assessments on mortgaged land, as opposed to a tax sale of mortgaged land, constitute a deprivation.

Zipperer v. City of Fort Myers, 41 F.3d 619, 624 (11th Cir. 1995) (App. A, A11).

The Eleventh Circuit held that the imposition of such super-priority special assessments do not immediately and drastically impair a mortgage lienholder's interests in a manner that amounts to a deprivation under this Court's opinion in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). Mr. Zipperer has brought this Petition before this Court because the Eleventh Circuit's analysis on this point is fundamentally flawed and conflicts with this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). The Eleventh Circuit focused

its analysis exclusively on the special assessments effects upon the landowner's property interest and ignored the effects of the imposition of the super-priority special assessments upon Mr. Zipperer's (the mortgagee's) interest in his first mortgage lien.

The Eleventh Circuit acknowledged that:

> had there been a tax sale of the mortgaged property which nullified Zipperer's entire interest as a mortgagee, Zipperer's interest would have been as "immediately and drastically diminished" as the mortgagee's interest in *Mennonite*.

Zipperer, 41 F.3d at 624 (App. A, A10, A11).

The Eleventh Circuit's assumption that the result of the tax sale in *Mennonite* was the entire nullification of the mortgagee's interest, however, was incorrect. As this Court noted in *Mennonite*, the result of the tax sale was not the complete abrogation of the mortgagee's property interest but rather the creation of a super-priority lien which:

> immediately and drastically diminishes the value of this security interest [the first mortgage] by granting the tax-sale purchaser a lien with priority over that of all other creditors.

Mennonite, 462 U.S. at 798.

In fact, under the Indiana Tax Sale Statute found unconstitutional in *Mennonite*, the mortgagee's interest could not be nullified until two years after the sale of the tax certificate when, in the event that the amount of the assessment or tax had not been redeemed, the certificate holder applied for and was issued a tax deed. *Id.* at

793-794. Upon receiving the tax deed, the tax deed purchaser may initiate an action to quiet title to which there are a limited number of affirmative defenses. *Id.* at 794. The *Mennonite* decision arose from a quiet title action brought by a tax deed purchaser under that statutory scheme. *Id.* at 795.

Additionally, in *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), the court explicitly found that:

> It is not necessary for a proceeding to directly adjudicate the merits of a claim in order to "adversely affect" that interest. In *Mennonite* itself, the tax sale proceedings did not address the merits of the mortgagee's claim. Indeed, the tax sale did not even completely extinguish that claim, it merely "diminished the value" of the interest. 462 U.S. at 798, 103 S. Ct., at 2711. Yet the court held that due process required that the mortgagee be given actual notice of the tax sale. [citations omitted]

Id. at 488.

Likewise, in *Connecticut v. Doehr*, 501 U.S. 1 (1991) this Court clearly stated:

> [T]he Court has never held that only such extreme deprivations trigger due process concern [citation omitted]. To the contrary, our cases show that even the temporary or partial impairments to property rights that attachments, liens and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, "are subject to the strictures of due process." [citations omitted]

Id. at 11.

Furthermore, regarding the issue of the effect that the subordination of a first mortgage lien to a lien created by a county ordinance has upon a mortgagee's interest under Florida law, a Florida District Court of Appeal has stated:

> We think the priority provision of the County's ordinance substantially impairs Coast Federal's prior mortgage lien by subordinating it to the County's lien. . . . The County posits that if the land is of sufficient value both liens can be satisfied, and Coast Federal will not have been adversely affected by the priority provision. We disagree with the County's position.
>
> We need not consider the value of the underlying property because the priority provision has worked an immediate impairment on Coast Federal's pre-existing mortgage lien. The nature of priority is such that Coast Federal is automatically at a substantially greater risk of losing its investment if it has only a second, as opposed to a first, priority lien. Furthermore, mortgages held by commercial institutions are frequently sold on the secondary market, and the subordination of Coast Federal's lien impairs the marketability of its mortgage. This immediate diminishment in the value of Coast Federal's contract is repugnant to our [Florida and Federal] constitutions. [citations omitted].

Sarasota County v. Andrews, 573 So.2d 113, 115 (Fla. Dist. Ct. App. 2d Dist. 1991).

Despite acknowledging the existence of the *Andrews* decision, the Eleventh Circuit held that it stood merely for the proposition that a mortgagee has a property right in the preservation of its mortgage interest and ignored the

Andrews court's discussion of the drastic negative effect that the imposition of a super-priority lien has upon that property right.

Furthermore, the Eleventh Circuit's decision in this case is also contrary to this Court's decision in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950) which holds that the due process protections of "notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" must be afforded to all parties whose property interests will be affected by such an action. Even the Eleventh Circuit recognized that a lien creation proceeding, such as the special assessment hearings in this case, is certain to have an effect upon Mr. Zipperer's property interest in his first mortgage lien. The Eleventh Circuit, however, held that:

> [A] special assessment lien prioritization constitutes a constitutional deprivation only if it is so palpably punitive or as arbitrary as to confer no benefit on the landowner, or "force[s] a landowner to make an improvement that while valuable to others, is useless to him."

Zipperer, 41 F.3d at 625 (App. A, A14).

The prior notice requirements of *Mullane*, however, do not depend upon a post-hoc analysis of how severely a property interest actually was affected by a particular proceeding. Instead, they are triggered by the risk that such a deprivation will occur and such a risk exists at the special assessment and lien prioritization hearings. The severity of such a risk is evidenced by the fact that the Eleventh Circuit stated that:

> We find it inappropriate to scrutinize the exact costs and benefits of municipal improvements in a constitutional deprivation analysis . . .

Zipperer, 41 F.3d at 624 n.5 (App. A, A11).

By taking such a position, the Eleventh Circuit effectively puts Mr. Zipperer in a "Catch-22." The Eleventh Circuit holds that Mr. Zipperer has no right to have his objections to the assessments and the subordination of his lien heard at the time that the super-priority lien is imposed and also holds that it will not later consider those objections in its analysis of whether or not a constitutional deprivation of Mr. Zipperer's property interest actually occurred. The Eleventh Circuit found no plain, speedy and adequate remedy exists in Florida for Mr. Zipperer to challenge the imposition of special assessment liens. The Eleventh Circuit held Mr. Zipperer has a constitutionally protected property interest in his first mortgage lien but decided that he has neither a pre-deprivation opportunity to be heard regarding his objections to a constitutional impairment of his rights nor an opportunity to later prove such a violation.

Furthermore, the Eleventh Circuit also misinterprets another key holding of this Court in *Mennonite* by mistakenly equating the landowner's interest in the assessed property with the lienholder's interest in his first mortgage lien. Because of this mistaken assumption, the Eleventh Circuit holds that it is "specious" for a mortgage lienholder to challenge the imposition of special assessments when the landowner has requested that the improvements be made.

This reasoning, however, ignores the fact that the landowner's and the mortgage lienholder's interests in the imposition of special assessments are *not* in accord. A first mortgagee's primary interest is in preserving the value of his first mortgage lien. This is why many mortgages, such as Mr. Zipperer's, contain a provision prohibiting impairment of the property by the mortgagor. A landowner's property interest, however, is not affected by whether or not a special assessment lien takes priority over a first mortgage lien. The landowner wants cheap construction financing. This public financing subordinates the prior first mortgage. If the landowner would have financed the construction privately, he would have either been required to get Mr. Zipperer's consent to the subordination of Mr. Zipperer's mortgage to the construction lender or "find" a construction lender who would take a second mortgage.

The risk of a deprivation of the mortgagee's constitutionally protected property right is at its greatest when improvements are requested by the landowner, as they were in this case. The *Mennonite* Court explicitly recognized that notice to a mortgagor was not the equivalent of giving notice to a mortgagee when it stated:

> Neither notice by publication and posting, nor mailed notice to the property owner, are means "such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it."

Mennonite, 462 U.S. at 799 (quoting from *Mullane*, 339 U.S. at 315).

In fact, in spite of the even greater risk of constitutional impairment of a mortgagee's first lien rights which exists when the landowner requests the special assessment, the Eleventh Circuit stated that:

> "[A] mortgagee may not insist that the taxing authority protect it from an imprudent special assessment levied because of the mortgagor's request." and that "if a landowner requests the improvements for which a special assessment is levied by a taxing authority, neither he nor [the mortgagee] may challenge the legislature's ascription of benefit to the landowner." [citations omitted].

Zipperer, 41 F.3d at 625 (App. A, A13, A14).

The above quotation blatantly ignores the fact that what Mr. Zipperer has requested is the right to voice any objections he had to the imposition of these super-priority special assessment liens at a hearing prior to the subordination of Mr. Zipperer's first mortgage to the special assessment liens. Totally foreclosing Mr. Zipperer's right to object to those special assessments, which have been requested by a landowner whose interests are materially different and, indeed, conflicting with Mr. Zipperer's, in order to avoid the assessing authority's "discomfort" with having to listen to objections, is not grounds for denying Mr. Zipperer's constitutional right to notice and an opportunity to be heard.

Finally, the Eleventh Circuit's holding is based upon the mistaken belief that if Mr. Zipperer's constitutionally protected property right was impaired by the super-priority special assessment liens, then Mr. Zipperer would be able:

> "to foreclose on an improved piece of property, ignore the special assessment liens, reap the benefits of the improvements, and not have the responsibility of paying for them."

Zipperer, 41 F.3d at 625 (App. A, A14).

First, if this Court ruled that Mr. Zipperer's first mortgage lien was not subordinated to the City of Fort Myers and Lee County's special assessment liens, then the City and County could easily protect their rights by either paying off Mr. Zipperer's mortgage or by bidding for the property at the reforeclosure sale. In this manner, the City and County, and not Mr. Zipperer, would still be able to reap the true benefits of their "improvements" to the property.

Second, the special assessments did not benefit, if at all, the land to anywhere near the cost of the assessments. Therefore, the City's and County's super-priority special assessment liens will allow them to foreclose upon the property, ignore Mr. Zipperer's first mortgage lien, reap the benefits of owning both the property and the "improvements," and not have the responsibility of paying off Mr. Zipperer's mortgage. As a private citizen, Mr. Zipperer should not be forced to pay such an enormous price for the benefit of the City and County when Mr. Zipperer did not ask for the special assessments and was not even given prior written notice and an opportunity to object to the imposition of the special assessments and the subordination of his first mortgage lien.

II. By granting this Writ, this Court will be able to address an issue not previously addressed on the application of its holding in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) and this Court's *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) due process analysis to an important question of constitutional local governmental power versus private property rights.

This Court should also grant Mr. Zipperer's Petition for Certiorari so that it can address the important local governmental power versus private rights question of what type of notice of hearing (written or published) a prior recorded first mortgagee is constitutionally entitled to receive prior to the imposition of special assessment liens which purport to subordinate the first mortgage. The Eleventh Circuit did not reach this important issue because it incorrectly held that the subordination of Mr. Zipperer's first mortgage lien was not a constitutional impairment of Mr. Zipperer's property right. This Petition has shown the Eleventh Circuit's decision on the property impairment question should be reversed because it is contrary to both this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), and Florida case law as exemplified by *Sarasota County v. Andrews*, 573 So.2d 113 (Fla. Dist. Ct. App. 2d Dist. 1991).

Therefore, this Court should grant Mr. Zipperer's petition for certiorari so that the Court can decide what type of notice of special assessment and super-priority lien imposition hearings is required to be given to prior-recorded mortgagees. Reaching this issue will enable the Court to conduct a post-*Mullane* due process analysis like the analysis it conducted in *Tulsa Professional Collection*

Services v. Pope, 485 U.S. 478 (1988) (holding that creditors which are reasonably ascertainable are entitled to written notice of probate proceedings which trigger the running of a non-claims statute), balancing the state's interest against the due process interest of Mr. Zipperer. Conducting this analysis will allow the Court to reaffirm the core holding of its decision in *Mennonite*. If a mortgagee's name and address is reasonably ascertainable from the public records, then a mortgagee must be given prior written notice of a proceeding seeking to create a super-priority lien which immediately and substantially impairs the value of that mortgage lien. *Mennonite*, 462 U.S. at 798. Applying this reasoning to the facts of Mr. Zipperer's case, Mr. Zipperer was entitled to prior written notice of the City and County's special assessment and lien prioritization hearings. His name and address were easily ascertainable from the mortgage recorded in the Lee County public records. The City and County's purpose in holding the hearings was to decide whether or not liens would be created which would immediately and substantially impair Mr. Zipperer's constitutionally protected property interest in his first mortgage lien. Clearly, Mr. Zipperer was constitutionally entitled to notice.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant the petition for a Writ of Certiorari to address the Eleventh Circuit's departure from the rationale of this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), to enable the Court to rectify the constitutional injury Mr. Zipperer has suffered, and to address this important issue concerning the constitutional boundary between local government power and individual property rights.

Respectfully submitted,

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APPENDIX

APPENDIX A – January 3, 1995 Eleventh Circuit Decision on the Merits, *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995) A1

APPENDIX B – November 22, 1993 District Court Order Granting Summary Judgment and Accompanying District Court Memorandum of Law B1

APPENDIX C – February 10, 1995 Eleventh Circuit Order Denying Mr. Zipperer's and The City of Fort Myers Motions for Rehearing C1

APPENDIX D – City of Fort Myers Petition for Rehearing D1

APPENDIX E – *Florida Statutes*, Chapter 170 (1993) E1

APPENDIX A

John O. ZIPPERER, Jr., an individual, Plaintiff-Appellant,

v.

CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; Fort Myers City Council, as Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Fort Myers City Council, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; Fort Myers City Council, as the Governing Authority of Improvement District No. 17; Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Improvement District No. 15, Omni Interstate Park; Improvement District No. 17; Lee County, a political subdivision of the State of Florida; Colonial Road Extension Improvement Special District Board, as the Governing Authority of the Defendant Special District known as Colonial Road Extension Improvement Special District; Colonial Road Extension Improvement Special District, Defendants-Appellees.

No. 93-3546.

United States Court of Appeals,
Eleventh Circuit.

Jan. 3, 1995.

Mortgagee brought action against city, county, and districts contained therein to challenge lien priority of special assessments imposed on mortgaged land. The United States District Court for the Middle District of Florida. No. 93-108-CIV-FTM-23D, L. Clure Morton, J.,

granted summary judgment for defendants, and mortgagee appealed. The Court of Appeals, Black, Circuit Judge, held that: (1) Tax Injunction Act did not bar federal court jurisdiction over mortgagee's action; (2) mortgage was constitutionally protected property interest; and (3) imposition and prioritization of special assessment liens on mortgaged land did not deprive mortgagee of his property interest, and, therefore, defendants did not violate mortgagee's due process rights.

Affirmed.

John H. Rains, III, Annis, Mitchell, Cockey, Edwards & Roehn, Tampa, FL, for appellant.

John S. Turner, Lee County Attorney's Office, Fort Myers, FL, for Lee County.

Jacqueline W. Hubbard, City of Fort Myers, City Attorney's Office, Theodore L. Tripp, Jr., Garvin & Tripp, P.A., Fort Myers, FL, for City of Fort Myers.

Kathleen E. Moore, Office of the Atty. Gen., Tallahassee, FL, amicus, State of Fla.

Appeal from the United States District Court for the Middle District of Florida.

Before HATCHETT and BLACK, Circuit Judges, and YOUNG* Senior District Judge.

BLACK, Circuit Judge:

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*Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

John Zipperer, the mortgagee of property located in Fort Myers, Florida, (the mortgaged land) brought this action against the City of Fort Myers (the City), Lee County (the County), and the districts contained therein (the Districts), (collectively, the Appellees) to challenge the lien priority of special assessments imposed on the mortgaged land. Zipperer claims that the prioritization of the special assessment liens over his mortgage violated his due process rights, because the Appellees did not give him actual notice of the imposition of these liens. The Appellees contend that the lien priority given to the special assessments did not deprive Zipperer of any property interest, and therefore, actual notice was not required before imposing and prioritizing the lien on the mortgaged land. The district court found no due process violation, and granted summary judgment in favor of the Appellees. We affirm.

I. *FACTS AND PROCEDURAL HISTORY*

In August 1986, Zipperer loaned $8,900,000 to Gerald DeSimone. The loan was secured by a mortgage in favor of Zipperer on land which DeSimone owned in Fort Myers, Florida. Zipperer promptly recorded the mortgage in the Lee County Official Record Book. Soon after, DeSimone requested that the City of Fort Myers make certain improvements on the mortgaged land, which the City was authorized to do under Florida law.[1]

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[1] Specifically, Chapter 170 of the Florida Statues entitled "Supplemental and Alternative Method of Making Local Municipal Improvements," provides a scheme for local governments

Pursuant to the powers given to it under Florida Statutes § 170, the City passed resolutions to establish Districts within the City, and make improvements in the Districts. The mortgaged land was included in the Districts. According to the resolutions, the following improvements were to be made in the Districts: (1) water and sewer facilities at an estimated cost of $13,000,000; (2) roadways and paving at an estimated cost of $10,900,000; and (3) other public improvements at an estimated cost of

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to provide public improvements and methods of payment for those improvements.

Florida Statutes § 170.01 (1993) provides that a municipality may provide for the construction of public improvements, and "provide for the payment of all or any part of the costs of any such improvements by levying and collecting special assessments on the abutting, adjoining, contiguous, or other specially benefited property."

Florida Statutes § 170.02 states that special assessments should be assessed upon the property benefitted by the improvements in proportion to the benefits derived from the improvements.

Florida Statutes § 170.07 requires that before these improvements or assessments are confirmed, ten days' written notice must be given to all property owners advising them of the proposed imposition of the special assessment liens, the nature and cost of the improvements, and a hearing time and place where the owners could be heard by the municipality regarding these issue. Although the statutes do not require a municipality to give actual notice of the proposed improvements or the hearings to those who are not property owners, it does require that the municipality publish notice of the hearings and proposed improvements. *Id.*

Florida Statutes § 170.09 provides that once confirmed, these special assessments constitute liens on the improved property, which are co-equal with the lien of other taxes and superior to all other liens, titles, and claims until paid.

$6,017,000. After paying for the improvements with government bonds, the City Council levied special assessments on a pro-rata acreage basis on the land located within the Districts and confirmed the assessments as first liens.

Before making the improvements, the City sent written notice to DeSimone advising him of the nature and costs of the proposed improvements, the special assessments, and his opportunity to appear before the City Council to be heard as to any issues concerning the improvements. The City did not directly notify Zipperer of the hearings or improvements, although the information was published in the local newspaper. After the improvements were confirmed, DeSimone failed to pay his pro-rata assessment installment for the improvements on the mortgaged land. In 1989, the City filed a lien on the mortgaged property for the unpaid assessments. Although the City provided DeSimone with actual notice of the filing of the lien and its priority status, it gave no notice to Zipperer.

In April 1990, Zipperer foreclosed on the mortgaged land, and subsequently purchased it. Zipperer then sued the Appellees challenging the lien prioritization of the special assessments on the mortgaged land because the Appellees did not give actual notice of the imposition to Zipperer. He claims that the special assessments and their lien prioritization impaired the value of his property interest without any opportunity to be heard, in violation of the Due Process clause of the Fourteenth Amendment. Zipperer ultimately sought to have the special assessments subordinated in priority to his prior recorded mortgage.

The Appellees filed a motion for summary judgment as to the due process claim, and a motion to dismiss based on jurisdictional grounds. The district court found no violation of due process occurred, and issued an order granting summary judgment in favor of the Appellees. In this appeal, we address at length only the due process issue.[2]

II. *STANDARD OF REVIEW*

We review a grant of summary judgment de novo. *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1104 (11th Cir. 1990). On review, we apply the same standards that bound the district court on the summary judgment motion below. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir.1990). Any reasonable dispute of material fact must be resolved in favor of the nonmoving party. *Barnes v. Southwest Forest Industries, Inc.*, 814 F.2d 607, 609 (11th Cir.1987).

III. *DISCUSSION*

A. *The Tax Injunction Act*

As a preliminary matter, this court has jurisdiction pursuant to 28 U.S.C. § 1331 as a federal question action arising under the Constitution, and we reject Appellees' contention that the Tax Injunction Act, 28 U.S.C. § 1341, bars federal court jurisdiction. Section § 1341, which deprives federal courts of jurisdiction to enjoin, suspend

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[2] The disposition of the due process issue makes it is unnecessary to reach the other issues raised by the parties on appeal.

or restrain the assessment, levy or collection of any tax under state law except where no plain, speedy and efficient remedy is available in state courts, is inapplicable in the instant case.

First, we note that the Florida Supreme Court has rejected the argument that special assessments are considered taxes under the Florida Constitution. *Boca Raton v. State*, 595 So.2d 25, 29 (Fla.1992) (declaring that "a legally imposed special assessment is not a tax"). Thus, although Appellees cite several provisions under the Florida Constitution and Florida Statutes which afford taxpayers remedies when challenging state taxes[3], these provisions afford no remedies to individuals when challenging special assessments. Consequently, Zipperer has no "plain, speedy and efficient remedy" in the Florida courts.

Second, Zipperer requests that we determine whether a lien prioritization without adequate notice violates constitutionally protected interests of a mortgagee, but he does not request that we "enjoin, suspend or restrain" the collection of any tax. *See Director of Revenue, State of Colorado v. U S.*, 392 F.2d 307, 311 (10th Cir.1968) (holding that the Tax Injunction Act does not bar a federal court

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[3] Florida Constitution, Article V, § 20(c)(3), grants Florida circuit courts jurisdiction to hear challenges to any state tax.

Florida Statutes § 72.011 (1988) and § 86.011 (1987) give Florida circuit courts the power to issue declaratory and injunctive relief in tax cases.

Florida Statutes § 215.26 (1989) gives Florida taxpayers the right to seek a tax refund from the state.

Florida Statutes §§ 194.171-194.231 (1993) provide a scheme to contest the imposition of taxes.

from hearing the case where the only question is one of lien priorities and no one seeks to suspend the collection of state taxes.) For these reasons, this Court has jurisdiction over Zipperer's constitutional due process claim.

B. *Procedural Due Process*

Procedural due process requires notice and an opportunity to be heard before any governmental deprivation of a property interest. *Donaldson v. Clark*, 819 F.2d 1551, 1558 (11th Cir.1987) (en banc) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378-79, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971). Thus, to determine if a procedural due process violation occurred in this case, we must resolve: (1) whether Zipperer had a constitutionally protected property interest; (2) whether he was deprived of that interest; and (3) if he was deprived of a constitutionally protected property interest, whether the Appellees failed to use constitutionally sufficient procedures before that deprivation occurred. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 1908, 104 L.Ed.2d 506 (1989); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33, 102 S.Ct. 1148, 1156, 71 L.Ed.2d 265 (1982).

1. *A Mortgage is a Constitutionally Protected Property Interest.*

Property interests are not created by the Constitution, but are defined by existing rules or understandings that stem from an independent source such as state law. *Board of Regents v. Roth*, 408 U.S. 564, 577-78, 92 S.Ct. 2701,

2709, 33 L.Ed.2d 548 (1972). Florida courts have determined that a mortgage can be a constitutionally protected property right. In *Sarasota County v. Andrews,* 573 So.2d 113 (Fla. 2d DCA 1991), the court found that a county's attempt to assert that a lien created by an ordinance was superior in right to a prior recorded mortgage, was a substantial impairment of the first mortgage lien for federal and state constitutional purposes. *Id.* at 115. Although *Sarasota* was decided under a contract impairment analysis, it nevertheless stands for the proposition that a mortgagee, who is in essence a party to a security contract, has a property right in preservation of its mortgage interest. *See also Mailman Development Corp. v. Segall,* 403 So.2d 1137, 1138 (Fla. 4th DCA 1981) (holding that a "mortgagee should not be required to accept a substituted security interest since a mortgagee lien is a property right. . . . ").

Moreover, Florida law gives a mortgagee the right to foreclose and reforeclose its liens. Fla.Stat. § 697.01 (1993). Therefore, a mortgage is a cause of action creating a lien on property. *See United of Florida, Inc. v. Illini Federal Savings & Loan Association,* 341 So.2d 793, 794 (Fla. 2d DCA 1977). The Supreme Court has specifically held that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982). *See Tulsa Collection Services v. Pope,* 485 U.S. 478, 485-86, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565 (1988). Thus, as a mortgagee, Zipperer has a constitutionally protected property interest in his mortgage.

2. *Appellees Did Not Impair Zipperer's Property Interest*

Having found that Zipperer has a constitutionally protected property interest, we must now decide whether the lien prioritization of the special assessments constitutes a deprivation or impairment of Zipperer's property interest. Zipperer argues that this case is governed by *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), in which the Supreme Court set forth the broad proposition that a mortgagee is entitled to notice reasonably calculated to apprise him or her of a pending tax sale because, under Indiana law, a mortgagee possesses a protected property interest that is adversely affected by a tax sale. In so ruling, the Court reasoned that "[t]he tax sale *immediately and drastically diminishes* the value of the security interest by granting the tax-sale purchaser a lien with priority over that of all other creditors." *Id.* at 798, 103 S.Ct. at 2711 (emphasis added).[4] The Court accordingly held that a state may not conduct a tax sale of property without mailing notice to any interest holder, such as a mortgagee, who is reasonably identifiable in the public records. *Id.*

We agree that had there been a tax sale of the mortgaged property which nullified Zipperer's entire interest as mortgagee, Zipperer's interest would have been as

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[4] Likewise, Florida courts have found a constitutional impairment where the alleged deprivation causes "immediate diminishment" in the value of the interest, or where the interest would be entirely eliminated. *Sarasota County v. Andrews*, 573 So.2d 113, 115 (Fla. 2d DCA 1991).

"immediately and drastically diminished" as the mortgagee's interest in *Mennonite*. It is uncontroverted, however, that Zipperer, as the present landowner, will retain a significant interest in the land even after its subordination to the special assessment. Therefore, the imposition of the special assessments and their lien prioritization do not immediately and drastically diminish his interests in a manner that would implicate a *Mennonite* due process deprivation.

Since the *Mennonite*, decision, neither the Supreme Court nor this Circuit have addressed whether the imposition and prioritization of special assessments on mortgaged land, as opposed to a tax sale of mortgaged land, constitute a deprivation. However, the Fifth Circuit has held in a factually similar case that the imposition of special assessments and their lien prioritization do not constitutionally impair or deprive a mortgagee of his interest in mortgaged land. *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir.1991).[5]

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[5] In *New Iberia*, assessments were based on the proportion of land abutting the proposed improvements. *Id.* at 612. In the instant case, assessments were made based on acreage within the districts. At oral argument, Zipperer maintained that the different assessment methods were a fundamental distinction between the two cases, because Zipperer's costs in relation to his benefits were higher than those of the mortgagee in *New Iberia*. However, the manner in which a municipality chooses to assess the costs and benefits of public improvements is discretionary under Florida law. *See* Fla.Stat. § 170.02 (1993). We find it inappropriate to scrutinize the exact costs and benefits of municipal improvements in a constitutional deprivation analysis and, therefore, this distinction has no bearing on the outcome of the case. *See New Iberia*, 921 F.2d at 614 (stating that the

The *New Iberia* court emphasized that "local tax assessments would not contravene the Fourteenth Amendment unless they amounted to such an abuse as to be an outright confiscation of property." *Id.* at 615 (*citing French v. Barbar Asphalt Paving Co.*, 181 U.S. 324, 21 S.Ct. 625, 45 L.Ed. 879 (1901)). The court distinguished *Mennonite*, reasoning that *Mennonite* in no way suggested that a taxing authority's decision to levy special assessments and give them priority over other liens affects a mortgagee in the same way that a tax sale does.[6] *New Iberia*, 921 F.2d at 614. Likewise, in the instant case the government did not confiscate property; it simply imposed liens on Zipperer's property for improvements which it had already made and paid for with government bonds.

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parties' emphasis on precise measurement of the costs and benefits of the municipal improvements misplaces the focus of a constitutional analysis).

[6] Application of the *Mennonite* decision has also been narrowed by the Eleventh Circuit in *FDIC v. Morrison*, 747 F.2d 610 (11th Cir.1984), *cert. denied*, 474 U.S. 1019, 106 S.Ct. 568, 88 L.Ed.2d 553 (1985). In *Morrison*, this Court held that under Alabama law, a mortgagor suffers no constitutionally protected property deprivation when the mortgagee, using Alabama statutory procedures, foreclosed within the contractual terms of the mortgage. *Id.* at 616. The Court observed that the mortgagor lost nothing by the mere fact that the foreclosing mortgagee acted in observance of its congressionally mandated purpose and, therefore, suffered no deprivation. *Id.* In so observing, the Court noted that "*Mennonite*, which construes a mortgagee's rights in a tax sale under Indiana law, offers us little guidance in construing a mortgagor's rights in a contractual foreclosure sale under Alabama law." *Id.* Likewise, we are not bound by the *Mennonite* decision in construing a mortgagee's rights with respect to special assessments levied on improved land which the mortgagee now owns.

The court in *New Iberia* also found it specious to challenge the imposition of the special assessments where the mortgagor itself requested that the city aid in making these improvements. The court stated:

> To allow the mortgagee to assert an unconstitutional taking because of a special assessment sought by the landowner would allow the mortgagee potentially to receive whatever benefit did result from the improvements without having to pay for them. Moreover, this claim by the mortgagee would place an impossible, if not absurd, burden upon the taxing authority: to police the landowner's requests for assistance with improvements so that his mortgagee will not be discomfited by ensuing special assessments. [The mortgagee's] implicit plea for governmental paternalism in an area normally controlled by sophisticated contractual relationships is as strange as it is unsupported by precedent.

Id. at 615-616.

In the instant case, as in *New Iberia*, the original landowner of the mortgaged land requested the improvements, and the present owner of that same land now reaps the benefits of these requested improvements. On this point, we agree with the Fifth Circuit that "a mortgagee may not insist that the taxing authority protect it from an imprudent special assessment levied because of the mortgagor's request," *id.* at 616, and that "if a landowner requests the improvements for which a special assessment is levied by a taxing authority, neither he nor [the mortgagee] may challenge the legislature's ascription

of benefit to the landowner." *Id.* Rather, a special assessment lien prioritization constitutes a constitutional deprivation only if it is so palpably punitive or arbitrary as to confer no benefit on the landowner, or 'force[s] a landowner to make an improvement that, while valuable to others, is useless to him.' *Id.* (*quoting Furey v. City of Sacramento*, 780 F.2d 1448, 1454 (9th Cir. 1986)).

Here, it is uncontroverted that Zipperer is the owner of the subject property. It is also uncontroverted that as a result of the Appellees' actions, the property now has water and sewage facilities, roadways and paving, and other valuable improvements, all of which are far from "useless" to Zipperer. Zipperer's property has obviously benefited from the improvements made and paid for by the Appellees. Therefore, we hold that the Appellees' imposition and prioritization of special assessment liens on the mortgaged land did not deprive Zipperer of his interest as a mortgagee. Any other holding would allow Zipperer to foreclose on an improved piece of property, ignore the special assessment liens, reap the benefits of the improvements, and not have the responsibility of paying for them. Due process does not protect such interests.[7]

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[7] Because there is no constitutional due process issue, it is unnecessary for us to decide whether the City's notice procedure was adequate.

IV. *CONCLUSION*

We hold that the Appellees' imposition and prioritization of the special assessment liens on the mortgaged land do not deprive Zipperer of his property interest as a mortgagee. Therefore, the Appellees did not violate Zipperer's constitutional due process rights and the district court's opinion is:

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JOHN O. ZIPPERER, JR.)
) NO. 93-108-CIV-FTM-23
VS.)
CITY OF FORT MYERS et al.)

ORDER
(Filed Nov. 22, 1993)

In accordance with the memorandum contemporaneously filed, the defendant's motion for summary judgment is hereby granted and this case is dismissed.

It is so ORDERED.

/s/ L. Clure Morton
L. CLURE MORTON
SENIOR U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JOHN O. ZIPPERER, JR.	)	
VS.	)	NO. 93-108-CIV-FTM-23
CITY OF FORT MYERS et al.	)	

MEMORANDUM

On or before August 14, 1986, Gerald DeSimone, Trustee, owned certain real estate located in Fort Myers, Lee County, Florida. On August 14, 1986, this property was mortgaged to John O. Zipperer, Jr. Thereafter, DeSimone petitioned the City of Fort Myers to establish improvement districts to include the DeSimone property. These districts were created and special assessments were made against the property located within their boundaries. These assessments were not paid. The mortgage dated August 14, 1986, was foreclosed and title vested in John O. Zipperer, Jr., on January 23, 1992. Plaintiff John O. Zipperer, Jr., asserts that his mortgage has priority over the liens of the improvement district because the improvement district did not give him personal notice of the liens. In effect, he is asserting that the priority status of the improvement district's liens constitutes a taking or condemnation of the property interest represented by his mortgage.

Motions to dismiss in this case have been filed and certain facts have been stipulated.

In *Federal Deposit Insurance Corp. v. Morrison*, 747 F.2d 610 (11th Cir. 1984), the court distinguished the facts of

that case from *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), and put to rest the theory of the plaintiff now at bar.

The plaintiff asserts that he was not afforded due process as to the imposition of the respective liens. Assuming arguendo that the holding in *Federal Deposit Insurance Corp. v. City of New Iberia*. 921 F.2d 610 (5th Cir. 1991), did not answer this question (although the court holds that it did) procedural due process requires an opportunity to be heard either pre- or post-action. In this type of case the State of Florida gives the plaintiff ample opportunity to litigate this question. For instance, the plaintiff has instituted a "second foreclosure" action under state law in the very state court which will determine the lien priority. There are other post-action remedies as well. Therefore the plaintiff has had and continues to have adequate procedural due process.

For the foregoing reasons, the defendant's motion to dismiss, treated as a motion for summary judgment, will be granted.

An appropriate order will be entered.

/s/ L. Clure Morton
L. CLURE MORTON
SENIOR U.S. DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-3546

JOHN O. ZIPPERER, JR., an individual,

Plaintiff-Appellant,

versus

CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependant Special District know as Colonial Road Extension; IMPROVEMENT SPECIAL DISTRICT; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING
(Filed Feb. 10, 1995)

BEFORE: HATCHETT, BLACK, Circuit Judges and YOUNG*, Senior District Judge.

PER CURIAM:

The petition for rehearing filed by appellant John O. Zipperer, Jr. is denied.

The petition for rehearing filed by appellee City of Fort Myers, et al. is denied.

ENTERED FOR THE COURT:

/s/ Susan H. Black
United States Circuit Judge

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* Honorable George C. Young, Senior U. S. District Judge for the Middle District of Florida, sitting by designation.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN O. ZIPPERER, JR.,
an individual,

Plaintiff/Appellant,

vs. Case No. 93-3546

THE CITY OF FORT MYERS,
LEE COUNTY, et al.,

Defendants/Appellees.
_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA
CASE NO. 93-108-CIV-FTM-23
L. CLURE MORTON, VISITING JUDGE

PETITION FOR REHEARING

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STATEMENT OF THE ISSUES

1. The Court has made no express determination regarding whether a Chapter 170 assessment is a tax under Federal law.

2. A Chapter 170 assessment can be challenged through plain, speedy, and efficient remedies in State Court.

STATEMENT OF THE CASE

The City of Fort Myers does not dispute the holdings of the United States Court of Appeals for the Eleventh Circuit as they pertain to the findings of law except to the extent of its determination in Part III A of its decision. Therein, the Court states that Appellant, Zipperer, has no plain, speedy, and efficient remedy in Florida courts.

Additionally, it is unclear to the Appellee if the Court seeks to apply its ruling to the narrow set of facts peculiar to the instant case, (which involves a prior foreclosure of a mortgage, subsequently returning the property to the mortgagee with a special assessment lien having a first priority over the mortgage). Although this Court has held that the Tax Injunction Act, 28 U.S.C. Section 1341, does not bar a Federal court from hearing a case where the only question is one of lien priorities, the Court further states that the Tax Injunction Act also does not apply because the Florida Constitution affords no remedies to individuals challenging special assessments. The Court has not ruled on the issue of whether a special assessment is a tax under Federal law. Appellee is therefore requesting the Court re-examine its analysis of these issues and clarify its position regarding these points.

ARGUMENTS FOR REHEARING

I.

THE COURT HAS MADE NO EXPRESS DETERMINATION REGARDING WHETHER A CHAPTER 170 ASSESSMENT IS A TAX UNDER FEDERAL LAW FOR PURPOSES OF THE TAX INJUNCTION ACT

The Court did not expressly determine in its opinion whether a special assessment enacted pursuant to *Florida Statutes*, Chapter 170, is a tax for purposes of the Tax Injunction Act, 28 U.S.C. Section 1341. However, because the Court rendered an analysis that discussed whether the Appellant was seeking to enjoin, suspend, or restrain the collection of a tax, it can be argued that the Court so held. Further clarification on this issue is requested to avoid the interpretation that the Eleventh Circuit Court of

Appeals is relying upon the Florida Supreme Court's opinion in *Boca Raton v. State,* 595 So.2d 25 (Fla. 1992) for a definition of what constitutes a tax for purposes of the Act.

Federal law normally controls the determination of this issue. The Court in *Robinson Protective Alarm Company v. City of Philadelphia,* 581 F.2d 371 (3d Cir. 1978), clearly states that under 28 U.S.C. Section 1341 the definition of what constitutes a tax is the definition held by the Federal Courts. Under the analysis in *Robinson,* the special assessments which the City has imposed in this case would be a "tax" for purposes of 28 U.S.C. Section 1341.

Tramel v. Schrader, 505 F.2d 1310 (5th Cir. 1975), was a suit to enjoin the collection of special assessments for street improvements in a City in Texas. The Plaintiff in *Tramel, Id.* argued that the tax injunction statute was inapplicable because a special assessment is not a tax. The Court held that the definition of what constitutes a "tax" for purposes of this statute is controlled by federal law, and that a special assessment was indeed a tax. One of the major reasons it so held was because a special assessment is a general revenue generating measure used by a city to construct public improvements. In *Williams v. City of Dothan, Alabama,* 745 F.2d 1406 (11th Cir. 1984), this Court reiterated the notion that a special street improvement assessment was a tax for the purpose of the Tax Injunction Act. In *Williams,* it was held that the "basic inquiry" is whether state law provides "a plain, speedy, and efficient way for the taxpayer to press its constitutional claims while preserving the right to challenge the amount of tax due", at Page 1412. Other Courts have

similarly held, for instance, in *Lake Lansing Protest Association v. Ingham Board of Commissioners,* 488 F.Supp. 767, (U.S. Dist. W.D. MI 1980), the Court stated, referring to *Tramel, supra*:

> "The initial question, thus presented, is whether the term "tax" as used in Section 1341 includes a special assessment levied by a municipal corporation. In *Tramel,* (citation deleted), the Court considered whether 28 U.S.C. Section 1341 barred a suit to enjoin the collection of special street assessments which were alleged to be violative of the plaintiff's federal constitutional rights. While Texas state courts had defined these special assessments as something other than "taxes", the Court in *Tramel* denied any controlling effects to the state court's distinction between taxes and special assessments . . . At Page 772.

II.

A CHAPTER 170 ASSESSMENT CAN BE CHALLENGED THROUGH PLAIN, SPEEDY, AND EFFICIENT REMEDIES IN STATE COURT

It also should be noted that the Appellant has not alleged in his complaint that he has no adequate state remedy. In *Colonial Pipeline Company v. Collins,* 921 F.2d 1237, a 1991 Eleventh Circuit case, cited by the Court in its Zipperer opinion holds that absent a showing by a complainant that State law does not provide sufficient remedy for his or her constitutional claims, the Federal District Court lacks jurisdiction to entertain a challenge to the State scheme of taxation under the Tax Injunction Act.

There are at least six instances in which the Appellant has an adequate state remedy:

First, the Appellant has a right to reopen his foreclosure suit in the State Court that he filed originally against the developer to bring in what he considers a junior lien holder, which could be the City of Fort Myers. In fact, the Appellant has already filed in State Court a motion for relief from judgment that has never been ruled on. So technically, his State Court foreclosure action is still pending, because the Court has never ruled on his motion.

Second, Appellant has a right to declaratory relief in State Court on this very issue, which he has never moved for. *Mlecka v. Citrus County*, 610 So.2d 677, (Fla. App. 5 Dist. 1992); *Dawson v. Childs*, 665 F.2d 705 (5th Cir. Unit A, January 14, 1984).

Third, as he stated in his Complaint, his contract for the mortgage with the developer had a provision in that contract that said that the developer will not cause any kind of lien or incumbrance to occur on that property. Therefore, he has a breach of contract action against the developer.

Fourth, the Appellant can file an action to quiet title and have the State Court decide the priority of the City's lien, as opposed to his mortgage lien.

Fifth, if all of the other five remedies fail, the Appellant also has a right to injunctive relief under state statutory law. Mr. Zipperer can clearly challenge both the amount and the methodology of the assessment in a state

court action for injunctive relief. *Steinberg v. City of Sunrise*, 592 So.2d 1148, (Fla. App. 4th Dist. 1992). In fact, in the *City of Sunrise* case, the Florida State Appellate Court clearly held that there were remedies available to an aggrieved property owner in a special assessment dispute regardless of a determination of his status as taxpayer.

Sixth, the Appellant has the ability to challenge the foreclosure of the City special assessment lien under a 42 U.S.C. Section 1983 action, which he has filed in Federal Court, he can do the same thing in State Court. The State of Florida permits Section 1983 litigation. *Tucker v. Resha*, 19 Fla. L. W. S5570 (1994); *Brooks v. Elliott*, 593 So.2d 1209 (Fla. 2d DCA 1992), and this Court expressly was told that the availability of this remedy must be considered. *Colonial Pipeline v. Collins*, 921 F.2d 1237 (11th Cir. 1991).

In *Winicki v. Mallard*, 645 F.Supp. 1244 (U. S. Dist. Ct. Middle Dist. Fla. 1985), the Court held that the plaintiff has the burden of demonstrating that he has no adequate state remedy. The Court further held that if he has an adequate state remedy for his claim, then the case should be sent back to Federal Court or at least dismissed out of Federal Court and the plaintiff should seek his adequate state remedy.

CONCLUSION

Although this Court has noted that the Florida Supreme Court rejected the argument that special assessments are considered taxes under the Florida Constitution, the Court should clarify its opinion regarding whether a special assessment is a tax for purposes of the Tax Injunction Act. The Court also should hold that the

Appellant does have a plain, speedy and efficient remedy in the State courts and that because this action challenges the lien that secures payment of the assessment at issue, federal courts have no subject matter jurisdiction over the claim.

Respectfully submitted,

CITY OF FORT MYERS

By: /s/ Jacqueline Williams Hubbard
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 23rd day of January, 1995 to John H. Rains, III, Esq., Annis, Mitchell, Cockey, Edwards & Roehn, Suite 2100, One Tampa City Center, P.O. Box 3433, Tampa, Florida 33601, John Turner, Esq., Lee County Attorney's Office, Post Office Box 398, Fort Myers, Florida 33902, Kathleen E. Moore, Esq., Assistant Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050, and Theodore L. Tripp, Esq., Garvin & Tripp, Post Office Box 2040, Fort Myers, Florida 33902.

/s/ Jacqueline Williams Hubbard
Jacqueline Williams Hubbard

APPENDIX E

FLORIDA STATUTES (1993)

CHAPTER 170

SUPPLEMENTAL AND ALTERNATIVE METHOD OF MAKING LOCAL MUNICIPAL IMPROVEMENTS

170.01 Authority for providing improvements and levying and collecting special assessments against property benefited.

170.02 Method of prorating special assessments.

170.03 Resolution required to declare special assessments.

170.04 Plans and specifications, with estimated cost of proposed improvement required before adoption of resolution.

170.05 Publication of resolution.

170.06 Preliminary assessment roll.

170.07 Publication of preliminary assessment roll.

170.08 Final consideration of special assessments; equalizing board to hear complaints and adjust assessments; rebate of difference in cost and assessment.

170.09 Priority of lien; interest; and method of payment.

170.10 Legal proceedings instituted upon failure of property owner to pay special assessment or interest when due; foreclosure; service of process.

170.11 Bonds may be issued to an amount not exceeding the amount of liens assessed for the cost of improvements to be paid by special assessment.

170.14 Governing authority of municipality required to make new assessments until valid assessment is

made if special assessment is omitted or held invalid.

170.15 Expenditures for improvements.

170.16 Assessment roll sufficient evidence of assessment and other proceedings of this chapter; variance not material unless party objecting materially injured thereby.

170.17 Denomination of bonds; interest; place of payment; form; signatures; coupons; and delivery.

170.18 Notice required where no newspaper is published in county in which municipality is situated.

170.19 Construction and authority of chapter.

170.20 Bonds negotiable.

170.21 Provisions of chapter supplemental, additional, and alternative procedure.

170.01 Authority for providing improvements and levying and collecting special assessments against property benefited. –

(1) Any municipality of this state may, by its governing authority:

(a) Provide for the construction, reconstruction, repair, paving, repaving, hard surfacing, rehard surfacing, widening, guttering, and draining of street, boulevards, and alleys; for grading, regrading, leveling, laying, relaying, paving, repaving, hard surfacing, and rehard surfacing of sidewalks; for constructing or reconstructing permanent pedestrian canopies over public sidewalks; and in connection with any of the foregoing, provide related lighting, landscaping, street furniture, signage,

and other amenities as determined by the governing authority of the municipality;

(b) Order the construction, reconstruction, repair, renovation, excavation, grading, stabilization, and upgrading of greenbelts, swales, culverts, sanitary sewers, storm sewers, outfalls, canals, primary, secondary, and tertiary drains, water bodies, marshlands, and natural areas, all or part of a comprehensive stormwater management system, including the necessary appurtenances and structures thereto and including, but not limited to, dams, weirs, and pumps;

(c) Order the construction or reconstruction of water mains, water laterals, and other water distribution facilities, including the necessary appurtenances thereto;

(d) Provide for the construction or reconstruction of parks and other public recreational facilities and improvements, including appurtenances thereto;

(e) Provide for the construction or reconstruction of seawalls;

(f) Provide for the drainage and reclamation of wet, low, or overflowed lands;

(g) Provide for offstreet parking facilities, parking garages, or similar facilities;

(h) Provide for mass transportation systems;

(i) Provide for improvements to permit the passage and navigation of watercraft; and

(j) Provide for the payment of all or any part of the costs of any such improvements by levying and collecting

special assessments on the abutting, adjoining, contiguous, or other specially benefited property.

However, offstreet parking facilities, parking garages, or other similar facilities and mass transportation systems must be approved by vote of a majority of the affected property owners. Any municipality which is legally obligated for providing capital improvements for water or sewer facilities within an unincorporated area of the county may recover the costs of the capital improvements by levying and collecting special assessments for the purposes authorized in this section on the specially benefited property; however, collections of the special assessment shall not take place until the specially benefited property connects to the capital improvement.

(2) Special assessments may be levied only for the purposes enumerated in this section and shall be levied only on benefited real property at a rate of assessment based on the special benefit accruing to such property from such improvements when the improvements funded by the special assessment provide a benefit which is different in type or degree from benefits provided to the community as a whole.

(3) Any municipality, subject to the approval of a majority of the affected property owners, may levy and collect special assessments against property benefited for the purpose of stabilizing and improving:

(a) Retail business districts,

(b) Wholesale business districts, or

(c) Nationally recognized historic districts,

or any combination of such districts, through promotion, management, marketing, and other similar services in such districts of the municipality. This subsection does not authorize a municipality to use bond proceeds to fund ongoing operations of these districts.

History. – s. 1, ch. 9298, 1923; CGL 3022; s. 1, ch. 67-552 s. 1 ch. 78-360; s. 32, ch. 79-164; s. 1, ch. 82-198; s. 32 ch. 83-204; s. 1, ch. 83-337; s. 1, ch. 87-103; s. 39, ch. 91-45; s. 1 ch. 92-156.

170.02 Method of prorating special assessments. Special assessments against property deemed to be benefited by local improvements, as provided for in s. 170.01, shall be assessed upon the property specially benefited by the improvement in proportion to the benefits to be derived therefrom, said special benefits to be determined and prorated according to the foot frontage of the respective properties specially benefited by said improvement, or by such other method as the governing body of the municipality may prescribe.

History. – s. 2, ch. 9298, 1923; CGL 3023.

170.03 Resolution required to declare special assessments. – When the governing authority of any municipality may determine to make any public improvement authorized by s. 170.01 and defray the whole or any part of the expense thereof by special assessments, said governing authority shall so declare by resolution stating the nature of the proposed improvement, designating the street or streets or sidewalks to be so improved, the location of said sanitary sewers, storm sewers, and drains, the location of said water mains, water laterals, and other water distribution facilities, the location of the

recreational facilities, the location of the seawalls, the location of the drainage project, or the location of the retail or wholesale business districts or nationally recognized historic districts to be improved, and the part or portion of the expense thereof to be paid by special assessments, the manner in which said assessments shall be made, when said assessments are to paid, what part, if any, shall be apportioned to be paid from the general improvement fund of the municipality; and said resolution shall also designate the lands upon which the special assessments shall be levied, and in describing said lands it shall be sufficient to describe them as "all lots and lands adjoining and contiguous or bounding and abutting upon such improvements or specially benefited thereby and further designated by the assessment plat hereinafter provided for." Such resolution shall also state the total estimated cost of the improvement. Such estimated cost may include the cost of construction or reconstruction, the cost of all labor and materials, the cost of all lands, property, rights, easements, and franchises acquired, financing charges, interest prior to and during construction and for 1 year after completion of construction, discount on the sale of special assessment bonds, cost of plans and specifications, surveys of estimates of costs and of revenues, cost of engineering and legal services, and all other expenses necessary or incident to determining the feasibility or practicability of such construction or reconstruction, administrative expense, and such other expense as may be necessary or incident to the financing herein authorized.

History. – s. 3, ch. 9298, 1923; CGL 3024; s. 2, ch. 59-396; s. 2, ch. 67-552; s. 1, ch. 78-330; s. 2, ch. 87-103; s. 40, ch. 91-45; s. 2, ch. 92-156.

170.04 Plans and specifications, with estimated cost of proposed improvement required before adoption of resolution. – At the time of the adoption of the resolution provided for in s. 170.03, there shall be on file with the town or city clerk, or like officer, of the municipality adopting said resolution, an assessment plat showing the area to be assessed, with plans and specifications, and an estimate of the cost of the proposed improvement, which assessment plat, plans and specifications and estimate shall be open to the inspection of the public.

History. – s. 4, ch. 9298, 1923; CGL 3025; s. 3, ch. 59-396.

170.05 Publication of resolution. – Upon the adoption of the resolution provided for in s. 170.03, the municipality shall cause said resolution to be published one time in a newspaper of general circulation published in said municipality, and if there be no newspaper published in said municipality, the governing authority of said municipality shall cause said resolution to be published once a week for a period of 2 weeks in a newspaper of general circulation published in the county in which said municipality is located.

History. – s. 5, ch. 9298, 1923; CGL 3026.

170.06 Preliminary assessment roll. – Upon the adoption of the resolution aforesaid, the governing authority of the municipality shall cause to be made a preliminary assessment roll in accordance with the

method of assessment provided for in said resolution, which assessment roll shall be completed as promptly as possible; said assessment roll shall show the lots and lands assessed and the amount of the benefit to and the assessment against each lot or parcel of land, and, if said assessment is to be paid in installments, the number of annual installments in which the assessment is divided shall also be entered and shown upon said assessment roll.

History. – s. 6, ch. 9298, 1923; CGL 3027; s. 3, ch. 67-552; s. 4, ch. 87-103.

170.07 Publication of preliminary assessment roll. Upon the completion of said preliminary assessment roll, the governing authority of the municipality shall by resolution fix a time and place at which the owners of the property to be assessed or any other persons interested therein may appear before said governing authority and be heard as to the propriety and advisability of making such improvements, as to the cost thereof, as to the manner of payment therefor, and as to the amount thereof to be assessed against each property so improved. Ten days' notice in writing of such time and place shall be given to such property owners. The notice shall include the amount of the assessment and shall be served by mailing a copy to each of such property owners at his last known address, the names and addresses of such property owners to be obtained from the records of the property appraiser or from such other sources as the city or town clerk or engineer deems reliable, proof of such mailing to be made by the affidavit of the clerk or deputy clerk of said municipality, or by the engineer, said proof to be filed with the clerk; provided; that failure to mail

said notice or notices shall not invalidate any of the proceedings hereunder. Notice of the time and place of such hearing shall also be given by two publications a week apart in a newspaper of general circulation in said municipality, and if there be no newspaper published in said municipality the governing authority of said municipality shall cause said notice to be published in like manner in a newspaper of general circulation published in the county in which said municipality is located; provided that the last publication shall be at least 1 week prior to the date of the hearing. Said notice shall describe the streets or other areas to be improved and advise all persons interested that the description of each property to be assessed and the amount to be assessed to each piece or parcel of property may be ascertained at the office of the clerk of the municipality. Such service by publication shall be verified by the affidavit of the publisher and filed with the clerk of said municipality.

History. – s. 7, ch. 9298, 1923; CGL 3028; s. 4, ch. 58-396; s. 1, ch. 77-102; s. 5, ch. 87-103.

170.08 Final consideration of special assessments; equalizing board to hear complaints and adjust assessments; rebate of difference in cost and assessment. – At the time and place named in the notice provided for in s. 170.07, the governing authority of the municipality shall meet and hear testimony from affected property owners as to the propriety and advisability of making the improvements and funding them with special assessments on property. Following the testimony, the governing authority of the municipality shall make a final decision on whether to levy the special assessments. Thereafter, the governing authority shall meet as an

equalizing board to hear and consider any and all complaints as to the special assessments and shall adjust and equalize the assessments on a basis of justice and right. When so equalized and approved by resolution or ordinance of the governing authority, a final assessment roll shall be filed with the governing authority of the municipality, and such assessments shall stand confirmed and remain legal, valid, and binding first liens upon the property against which such assessments are made until paid; however, upon completion of the improvement, the municipality shall credit to each of the assessments the difference in the assessment as originally made, approved, and confirmed and the proportionate part of the actual cost of the improvement to be paid by special assessments as finally determined upon the completion of the improvement, but in no event shall the final assessments exceed the amount of benefits originally assessed. Promptly after such confirmation, the assessments shall be recorded by the city clerk in a special book, to be known as the "Improvement Lien Book," and the record of the lien in this book shall constitute prima facie evidence of its validity. The governing authority of the municipality may by resolution grant a discount equal to all or a part of the payee's proportionate share of the cost of the project consisting of bond financing costs, such as capitalized interest, funded reserves, and bond discount included in the estimated cost of the project, upon payment in full of any assessment during such period prior to the time such financing costs are incurred as may be specified by the governing authority.

History. – s. 8, ch. 9298, 1923; CGL 3029; s. 5, ch. 59-398; s. 1, ch. 78-330; s. 73, ch. 81-259; s. 6, ch. 87-103.

170.09 Priority of lien; interest; and method of payment. – The special assessments shall be payable at the time and in the manner stipulated in the resolution providing for the improvement; shall remain liens, coequal with the lien of all state, county, district, and municipal taxes, superior in dignity to all other liens, titles, and claims, until paid; shall bear interest, at a rate not to exceed 8 percent per year, or, if bonds are issued pursuant to this chapter, at a rate not to exceed 1 percent above the rate of interest at which the improvement bonds authorized pursuant to this chapter and used for the improvement are sold, from the date of the acceptance of the improvement; and may, by the resolution aforesaid and only for capital outlay projects, be made payable in equal installments over a period not to exceed 20 years, to which, if not paid when due, there shall be added a penalty at the rate of 1 percent per month, until paid. However, the assessments may be paid without interest any time within 30 days after the improvement is completed and a resolution accepting the same has been adopted by the governing authority.

History. – s. 6, ch. 9298, 1923; CGL 3030; s. 6, ch. 59-396; s. 1, ch. 61-349; s. 4, ch. 67-552; s. 3, ch. 80-318; s. 74, ch. 81-259; s. 5, ch. 82-195; s. 2, ch. 82-198; s. 33, ch. 83-204.

170.10 Legal proceedings instituted upon failure of property owner to pay special assessment or interest when due; foreclosure; service of process. – Each annual installment provided for in s. 170.09 shall be paid upon the dates specified in said resolution, with interest upon all deferred payments, until the entire amount of said assessment has been paid, and upon the failure of any

property owner to pay any annual installment due, or any part thereof, or any annual interest upon deferred payments, the governing authority of the municipality shall cause to be brought the necessary legal proceedings by a bill in chancery to enforce payment thereof with all accrued interest and penalties, together with all legal costs incurred, including a reasonable solicitor's fee, to be assessed as part of the costs and in the event of default in the payment of any installment of an assessment, or any accrued interest on said assessment, the whole assessment, with the interest and penalties thereon, shall immediately become due and payable and subject to foreclosure. In the foreclosure of any special assessment service of process against unknown or nonresident defendants may be had by publication, as now provided by law in other chancery suits. The foreclosure proceedings shall be prosecuted to a sale and conveyance of the property involved in said proceedings as now provided by law in suits to foreclose mortgages; or, in the alternative, said proceeding may be instituted and prosecuted under chapter 173.

History. – s. 10, ch. 9298, 1923; CGL 3031; s. 7, ch. 59-396.

170.11 Bonds may be issued to an amount not exceeding the amount of liens assessed for the cost of improvements to be paid by special assessment. – After the equalization, approval and confirmation of the levying of the special assessments for improvements as provided by s. 170.06 and as soon as a contract for said improvement has been finally let, the governing authority of the municipality may by resolution or ordinance authorize the issuance of bonds, to be designated

"improvement bonds, series No. ___," in an amount not in excess of the aggregate amount of said liens levied for such improvements. Said bonds shall be payable from a special and separate fund, to be known as the "improvement fund, series No. ___," which shall be used solely for the payment of the principal and interest of said "improvement bonds, series No. ___" and for no other purpose. Said fund shall be deposited in a separate bank account; and all the proceeds collected by the city from the principal, interest, and penalties of said liens shall be deposited and held in said fund. Said bonds so issued shall never exceed the amount of liens assessed, and said bonds shall mature not later than 2 years after the maturity of the last installment of said liens. Said bonds shall bear certificates signed by the clerk of the municipality certifying that the amount of liens levied, the proceeds of which are pledged to the payment of said bonds, are equal to the amount of the bonds issued. The bonds may be delivered to the contractor in payment for his work or may be sold at public or private sale for not less than 95 percent of par and accrued interest, the proceeds to be used in paying for the cost of the work. Said bonds shall not be a general obligation of the city, but shall be payable solely out of said assessments, installments, interest,[1] penalties, provided that said bonds may be secured by any other revenues that may be legally available for such purpose. Any surplus remaining after payment of all bonds and interest thereon shall revert to the city and be used for any municipal purpose. Bonds issued under this

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[1] The word "and" preceding the word "penalties" was stricken by s. 3, ch. 82-156. See Journal of the Senate 1992, p. 705.

section may be refunded from time to time as provided in this section.

History. – s. 11, ch. 9298, 1923; CGL 3032; s. 8, ch. 59-396; s. 5, ch. 67-552; s. 1, ch. 78-330; s. 3, ch. 92-156.

170.14 Governing authority of municipality required to make new assessments until valid assessment is made if special assessment is omitted or held invalid. – If any special assessment made under the provisions of this chapter to defray the whole or any part of the expense of any said improvement shall be either in whole or in part annulled, vacated or set aside by the judgment of any court, or if the governing authority of any municipality shall be satisfied that any such assessment is so irregular or defective that the same cannot be enforced or collected, or if the governing authority of a municipality shall have omitted to make such assessment when it might have done so, the governing authority of the municipality shall take all necessary steps to cause a new assessment to be made for the whole or any part of any improvement or against any property benefited by any improvement, following as nearly as may be the provisions of this chapter and in case such second assessment shall be annulled, said governing authority of any municipality may obtain and make other assessments until a valid assessment shall be made.

History. – s. 14, ch. 9298, 1923; CGL 3035; s. 11, ch. 56-396.

170.15 Expenditures for improvements. – The governing authority of any municipality may pay out of its general funds or out of any special fund that may be

provided for that purpose such portion of the cost of any improvement as it may deem proper.

History. – s. 15, ch. 9298, 1923; CGL 3036; s. 12, ch. 59-396.

170.16 Assessment roll sufficient evidence of assessment and other proceedings of this chapter; variance not material unless party objecting materially injured thereby. – Any informality or irregularity in the proceedings in connection with the levy of any special assessment under the provisions of this chapter shall not affect the validity of the special assessment where the assessment roll has been confirmed by the governing authority. The assessment roll as finally approved and confirmed shall be competent and sufficient evidence that the assessment was duly levied, that the assessment was duly made and adopted, and that all other proceedings adequate to the adoption of the assessment roll were duly had, taken, and performed as required by this chapter, and no variance from the directions hereunder shall be held material unless it be clearly shown that the party objecting was materially injured thereby. However, nothing in this section shall relieve the governing authority from notifying the affected property owners of the special assessments as required by this chapter.

History. – s. 16, ch. 9298, 1923; CGL 3037; s. 7, ch. 87-103; s. 41, ch. 91-45.

170.17. Denomination of bonds; interest; place of payment; form; signatures; coupons; and delivery. – All bonds issued under this chapter shall be the denomination of $500, or some multiple thereof, and shall bear interest as provided in s. 215.84 until paid in full, payable

annually or semiannually, and both principal and interest shall be payable at such place or places as the governing authority may determine. The form of such bonds shall be fixed by resolution of the governing authority of the municipality, and said bonds shall be signed by the mayor or chief executive officer of the municipality and the clerk or other like officers thereof, under the seal of the municipality; the coupons, if any, shall be executed by the facsimile signatures of said officers. The delivery of any bond and coupon so executed at any time thereafter shall be valid although before the date of delivery the person signing such bond or coupons shall cease to hold office.

History. – s. 17, ch. 9298, 1923; CGL, 3038; s. 13, ch. 59-396; s. 16, ch. 73-302; s. 6, ch. 82-195; s. 4, ch. 92-156.

170.18 Notice required where no newspaper published in the county in which the municipality is situated. – Where, by any of the provisions of this chapter, any notice is required to be given by publication in a newspaper, if there be no newspaper published in the county in which the municipality is situated, then such notice shall be posted for the prescribed period of time in at least five public places in the municipality, one of which shall be the city or town hall, or the place of meeting of the governing authority, if there be no city or town hall.

History. – s. 18, ch. 9298, 1923; CGL 3039.

170.19 Construction and authority of chapter. – This chapter shall, without reference to any other law of Florida, be full authority for the issuance and sale of the bonds by this chapter authorized, and shall be construed

as an additional and alternative method for the financing of the improvements referred to herein. No ordinance, resolution, election or proceeding in respect of the issuance of any bonds hereunder shall be necessary, except such as is required by this chapter, and no publication of any resolution, ordinance, election, notice or proceeding relating to the issuance of the bonds provided for by this chapter shall be required, except such as required by this chapter.

History. – s. 19, ch. 9298, 1923; CGL 3040; s. 14, ch. 59-396.

170.20 Bonds negotiable. – Bonds issued under s. 170.11 shall have all the qualities of negotiable paper under the law merchant, and shall not be invalid for any irregularity or defection in the proceedings for the issue and sale thereof, and shall be incontestable in the hands of bona fide purchasers or holders thereof for value.

History. – s. 20, ch. 9298, 1923; CGL 3041; s. 15, ch. 59-396.

170.21 Provisions of chapter supplemental, additional, and alternative procedure. – This chapter shall not repeal any other law relating to the subject matter hereof, but shall be deemed to provide a supplemental, additional, and alternative method of procedure for the benefit of all cities, towns, and municipal corporations of the state, whether organized under special act or the general law, and shall be liberally construed to effectuate its purpose.

History. – s. 21, ch. 9298, 1923; CGL 3042; s. 16, ch. 59-396.